**Louisiana Law Review**

Volume 16 | Number 2
*The Work of the Louisiana Supreme Court for the 1954-1955 Term*
*February 1956*

# Torts and Workmen's Compensation: Workmen's Compensation

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## WORKMEN'S COMPENSATION

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Of the four workmen's compensation cases considered by the Supreme Court in its past term, two can be dismissed rather summarily. In one,[1] the recurrent question of distinguishing between permanent and temporary disability occurred. The court had little trouble in affirming the court of appeal's decision[2] that a plaintiff suffering from spondylolisthesis at the time of the two injuries upon which his claim was based was entitled to compensation only for the period of actual disability following his last accident, since the evidence convincingly showed that the injuries were no different from other back strains for which he had collected compensation previously and from which he rapidly recovered. The lack of proof of any lasting impairment or deterioration of the plaintiff's physical condition or any aggravation of his congenital defect was an added reason, in the Supreme Court's opinion, for concluding there was no basis for his claim of total and permanent disability.

In the other decision,[3] the court affirmed a trial court's ruling that an employer's insurer, intervening in a negligence action brought by the employee against third parties, was entitled to recover the amount of compensation paid to the employee from the damages awarded him in his suit.[4]

### *Prescription*

For many years after the passage of the workmen's compensation legislation in Louisiana all claims were regarded as prescribed where brought after a year from the date of the accident, even though in some cases the symptoms from injuries suffered in the accident did not appear or total disability did not ensue until after that time.[5] In 1934 the Legislature amended the prescription statute to read in part:

"Where the injury does not result at the time of, or develop

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1. Broussard v. R. H. Gracey Drilling Co., 227 La. 882, 80 So.2d 850 (1955).
2. 70 So.2d 713 (La. App. 1954).
3. Ainsworth v. Henry & Hall, 227 La. 379, 79 So.2d 489 (1955).
4. The right of the employee to recover in the negligence action was reaffirmed by the court in a companion case, Amyx v. Henry & Hall, 227 La. 364, 79 So.2d 483 (1955), reversing the court of appeal decision in 69 So.2d 69 (La. App. 1953). For a discussion of the tort aspects of the two cases, see page 276 *supra*.
5. See, *e.g.*, White v. Louisiana Western Ry., 174 La. 308, 140 So. 486 (1932).

> immediately after the accident, the limitation shall not take effect until the expiration of one year from the time the injury develops, but in all such cases the claim for payment shall be forever barred unless the proceedings have been begun within two years from the date of the accident."[6]

Despite the amendment, the one-year prescriptive period from the date of the accident was held applicable to cases where the injury was attended by immediate pain, but the claimant nevertheless continued to work until forced to stop by aggravation of his condition due either to the nature of the injury or to improper diagnosis. The courts reasoned that when pain occurred, the injury must have developed, and therefore the prescriptive period had to run from the time of the injury since that was when compensable disability accrued, rather than when the employee was factually disabled from further work. In 1952, however, this narrow construction was virtually abandoned in *Mottet v. Libbey-Owens-Ford Glass Co.*,[7] in which the Supreme Court held that in such cases the prescriptive period does not begin until the injury actually develops into total disability.

This past term, in *Johnson v. Cabot Carbon Co.*[8] the court again reaffirmed its stand in the *Mottet* case and, to some degree, extended it even further. In the *Johnson* case, the plaintiff had suffered a severe lumbosacral strain on December 12, 1951. Because he had a wife and six children to support, he continued work despite recurrent pain until June 5, 1952, when he was no longer able to work. After medical treatment he tried again in November 1952, was given the same heavy work, and, finally, after quitting for the second time because of the pain, he filed

6. La. Acts 1934, No. 29, p. 187, now part of LA. R.S. 23:1209 (1950).

7. 220 La. 653, 57 So.2d 218 (1952), commented on in *The Work of the Louisiana Supreme Court for the 1951-1952 Term — Workmen's Compensation*, 13 LOUISIANA LAW REVIEW 230, 284 (1953). In the *Mottet* case, the claimant had been injured in January 1946 while lifting heavy glass. At the time, his physician diagnosed his ailment as neurosis. In September of that year he learned while on vacation, after examination by an orthopedic surgeon, that his injury consisted of a partial thinning of the fifth lumbar intervertebral space. He so informed his employer and was shifted to light work, but was forced to quit because of his injury in March 1947. The court felt that the injury was of the sort within the purview of the amended statute since it did not develop into permanent disability until the latter date, and reversed the court of appeal which had held that the prescriptive period began in January 1946. See also Tate, *Workmen's Compensation Claimants' Latent or Unknown Injuries — Prescription*, 12 LOUISIANA LAW REVIEW 73 (1951), for a discussion of the *Mottet* case in the court of appeal and the general problem of improperly diagnosed injuries.

8. 227 La. 941, 81 So.2d 2 (1955).

suit on December 17, 1952, for compensation. The court of appeal ruled[9] that the one-year prescriptive period had already elapsed because, in its view, the injury developed on the date of the accident and not the time the claimant quit work. "Now, certainly, when plaintiff was examined and administered to by two doctors following the accident and by the company physician for a period of three months, it can hardly be said that it did not develop at the time it happened."[10] The *Mottet* case was distinguished on the basis that in that case there had been an improper diagnosis which was not discovered until several months after the injury, whereupon the employee was given lighter work; whereas in the instant case, the plaintiff had been treated for a lumbosacral sprain from the time of the accident to the time of the suit and had continued heavy work. More importantly, the intermediate court felt that the well-settled rule that an employee who continues to work after an accident resulting in injury despite his pain and discomfort may nevertheless be regarded as totally disabled and entitled to compensation was applicable and gave added support to its belief that an immediate disability had occurred.[11]

The Supreme Court, on the other hand, felt the case came clearly under the *Mottet* holding and quoted extensively from it. As in that case, it avoided directly the question of the applicability of the rule relied on by the court of appeal that total disability occurs when an employee cannot perform his duties except through substantial suffering, and stated simply: "If he could work, it is evident that his injury was not a total disability."[12] The question of heavy work versus light work made no difference; if anything, the court felt the continuation of his heavy duties by the plaintiff probably brought on the ill results. It was not until he was forced to discontinue work on June 5, 1952, because of his aggravated condition, that the injury developed to the point of total disability and it was on that date the prescriptive period commenced.

The two cases seem to indicate the date the employee is forced to discontinue work because of his suffering is an important, if not decisive, factor in determining under R.S. 23:1209 the time an injury has developed. If so, an anomalous situation results,

9. 75 So.2d 389 (La. App. 1954).
10. *Id.* at 403.
11. For a discussion of the court of appeal decision, see MALONE, LOUISIANA WORKMEN'S COMPENSATION 77 (Supp. 1955).
12. 227 La. 941, 945, 81 So.2d 2, 4 (1955).

since the court refused to abandon the pain and suffering rule, in which one test of total disability is adopted for compensation purposes and another for prescriptive purposes. Although illogical, it may be, as Professor Malone suggests,[13] the court is endeavoring to keep from penalizing the employee, who though injured and suffering pain, continues work either in hopes his situation might better itself or because of economic necessity. Cogent recognition of this is discerned in Justice Moise's rather indignant query: "Must plaintiff now be penalized because he tried to perform his duty to support his loved ones?"[14]

*Penalty for Arbitrary Refusal to Pay Compensation*

Recently, in *Wright v. National Surety Corporation*[15] the Supreme Court held that R.S. 22:658 penalizing insurance companies that arbitrarily refused to pay claims could be construed to apply for the benefit of insured employees under workmen's compensation laws. This construction was confirmed by the Legislature by amendment of that section in 1952.[16] Since then the penalty has been applied in several workmen's compensation cases. Of these, the most recent to appear before the Supreme Court is *Fruge v. Pacific Employers Insurance Co.*[17] There the plaintiff had been injured in June 1951 and received compensation until the end of the year. Upon its discontinuance, he filed suit in April 1952 but did not go to trial until well into 1953 because the insurer recommenced payment until March 30, 1953. On that date payments were again discontinued despite the fact that twenty-six days before, one of the defendant's physicians submitted a written report indicating the plaintiff had made no progress in recovering from his injury and that he had a disability of approximately twenty percent. Upon trial, the plaintiff was awarded compensation for partial disability which, on appeal, the court of appeal amended to compensation for total

13. MALONE, LOUISIANA WORKMEN'S COMPENSATION 79 (Supp. 1955). He also suggests that: "A strictly logical attitude here would encourage the worker to prosecute his claim upon the first substantial indication of suffering. This, in many instances, would make for unnecessary litigation and would tend to encourage resort to compensation instead of a stoic effort to continue work in the hope of rehabilitation. The Supreme Court apparently recognized this in the *Mottet* decision."

14. 227 La. 941, 945, 81 So.2d 2, 4 (1955).

15. 221 La. 486, 59 So.2d 695 (1952), 13 LOUISIANA LAW REVIEW 633 (1953).

16. La. Acts 1952, No. 417, p. 1071.

17. 226 La. 530, 76 So.2d 719 (1954).

permanent disability. In addition, the intermediate court assessed the statutory penalty and attorneys' fees on the grounds that the defendant's action had been arbitrary and capricious.[18]

The Supreme Court in its opinion agreed with the court of appeal that the action had been arbitrary and without probable cause and that the statutory penalty should apply. While the defendant might have been justified in refusing to pay for total and permanent disability, the defendant's own medical evidence indicated there was no bona fide dispute as to the plaintiff's partial disability; hence, its discontinuance of payments could not have been in good faith. If the defendant had offered what it deemed the proper compensation for partial disability, the outcome, the court stated, might have been different, but clearly its action in discontinuing payments entirely and forcing the plaintiff to litigation was the sort deserving penalty as envisaged by the Legislature in its amendment to R.S. 22:658 and the court in the *Wright* case, which decision, incidentally, the court asserted covered squarely the facts of the instant case.

On the basis of the facts, there can be little quarrel with the court's decision. The opinion serves as warning to insurers who would preclude the penalty to avoid arbitrary action in discontinuing compensation payments especially in cases where the question is not the existence of compensable disability but its degree.[19]

18. 71 So.2d 625 (La. App. 1954).

19. For an extended discussion of the penalty imposed by LA. R.S. 22:658 (1950) for an insurer's arbitrary refusal to pay a compensation claim, see MALONE, LOUISIANA WORKMEN'S COMPENSATION § 389 (Supp. 1955).